APPENDIX A

MAJORITY OPINION IN THE COURT OF APPEALS OF MARYLAND [1]

[Caption Omitted in Printing]

HAMMOND, C.J.
HORNEY*
MARBURY
BARNES
SINGLEY,
JJ.

OPINION BY SINGLEY, J.
BARNES, J. DISSENTS.

*Horney, J., participated in the hearing of the case, in the conference in regard to its decision and in the adoption of the opinion, but he had retired from the Court prior to its filing.

[Filed May 31, 1968]

This case comes to us on an appeal and cross appeal from a decree of the Circuit Court of Baltimore City entered in an equity proceeding brought to resolve a dispute which had arisen between two licensees of a national employment agency.

At the trial before the chancellor, the testimony was extensive and voluminous exhibits were introduced. We have no quarrel with the chancellor's findings of facts, which are carefully set out in his opinion. Maryland Rule 886a; *Wood v. Wood*, 227 Md. 211, 176 A.2d 229 (1961); *Parker v. Parker*, 222 Md. 69, 158 A.2d 607 (1960); *Moran v. Moran*, 219 Md. 399, 149 A.2d 399 (1959). We are not, however, bound by his conclusions of law. *Pallace v. Inter City Land Co.*, 239 Md. 549, 212 A.2d 262 (1965); *Space Aero Products Co. v. R. E. Darling Co.*, 238 Md. 93, 208 A.2d 74 (1965).

Snelling and Snelling, Inc. is a Pennsylvania corporation, which had its principal office in Philadelphia and later in

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[1] This opinion appears at pages 3-24 of the certified transcript of record (R. 3-24) herein.

Radnor, Pennsylvania. Although not a party to the case, it will be referred to in this opinion as "Philadelphia Snelling." Its operations have two aspects: In Philadelphia, commencing as a partnership in 1950, and later as a corporation, it has operated an employment agency. The other phase of Philadelphia Snelling's activity commenced in 1955 and involves the licensing of franchisees, under which individuals or corporations are permitted to operate similar employment agencies in various sections of the country under the trade name "Snelling and Snelling," using the techniques, office procedures, business forms, trade name, and after 1961 the trade mark "Fort Snelling."[1]

The consideration for such a license usually consists of an initial lump sum payment by the franchisee, plus a 7% commission or override on the gross monthly billings of the franchisee, of which 2% was originally allocated to the cost of a program of national advertising contracted for by Philadelphia Snelling. While the agreements under which franchisees have been licensed have varied, all of them contain stringent provisions restricting assignment, controlling the operation of the franchise, and insuring uniformity in stationery, forms and advertising.

On 5 September 1956, Philadelphia Snelling entered into a licensing agreement with Lionel Jacobs and James A. MacDougal, who paid $12,000 for a franchise which gave them "the exclusive right to use the name 'Snelling & Snelling'" in a territory:

> "Comprised of Baltimore, Maryland, and the surrounding counties * * * limited to the following Counties * * *: Queen Anne, Harford, Baltimore, Carroll, Howard, Anne Arundel and Kent; it being expressly understood between the parties that the

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[1] Philadelphia Snelling's registration of the service mark "Snelling and Snelling" and of the trade mark "Fort Snelling" with the U.S. Patent Office became effective on 20 June 1961 and 23 May 1961, respectively. Since this was subsequent to the agreement with the appellee it was conceded that state law was controlling in this case.

right to solicit applicants within said territory shall not be granted to any other Licensee."

The Jacobs-MacDougal effort proved unsuccessful, and the agreement was ultimately revoked by Philadelphia Snelling.

On 5 July 1960, Philadelphia Snelling entered into a licensing agreement with Snelling and Snelling of Baltimore, Inc., a Maryland corporation (Baltimore Snelling) of which Maynard Z. Drossner was president, treasurer and principal owner. Drossner had considered other franchises, including one in Atlantic City, and possibly another in Norristown, Pennsylvania (this testimony is disputed, however); knew that Philadelphia Snelling had licensed independent franchisees in the environs of Philadelphia; was aware of the failure of the Jacobs-MacDougal franchise; and knew also that their territory had included not only Baltimore City, but the surrounding counties.

The agreement with Baltimore Snelling contained two provisions which are particularly significant:

"1.(a) Snelling [Philadelphia Snelling] hereby grants to licensee [Baltimore Snelling] *the exclusive right to use the name* Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. *in connection with one office only to be opened by licensee in Baltimore, Maryland.* Licensee shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall licensee change its name without first obtaining the written consent of Snelling; nor shall licensee establish any branch or additioanl office without the written consent of Snelling. (Emphasis added.)

* * *

"9. * * * Licensee and shareholders [Baltimore Snelling] agree, when requested by Snelling [Philadelphia Snelling], to waive any and all objections licensee may legally have against the use of the

name 'Snelling and Snelling' in territories other than the territory granted to licensee herein."

Baltimore Snelling commenced operations in August, 1960, and was immediately successful. In 1962, Drossner wished to expand his business to include Towson, the county seat of Baltimore County, which is beyond the corporate limits of Baltimore City. When Drossner failed to reach agreement with Philadelphia Snelling on the amount of the franchise fee, he began to press the contention that Towson was a part of the metropolitan area within the contemplation of the parties when the licensing agreement of 5 July 1960 was signed, granting to Baltimore Snelling a franchise for Baltimore, Maryland. Philadelphia Snelling resisted this, relying on a literal interpretation of the agreement: *i.e.*, that Baltimore, Maryland, meant the corporate limits of Baltimore City.

Although the agreement with Baltimore Snelling limited it to one office in Baltimore, in 1963 Drossner wanted to open a second office in the heavily industrialized area in Highlandtown, which lies within the city's eastern boundary.

In 1963, Drossner and his wife formed a Maryland corporation, Snelling and Snelling of Highlandtown, Inc. (Highlandtown Snelling) and on 20 December 1963, Highlandtown Snelling entered into a licensing agreement with Philadelphia Snelling. While structured similarly to the agreement of 5 July 1960, which had been entered into with Baltimore Snelling, the contract was patently more sophisticated, and probably reflected Philadelphia Snelling's experience in the franchise field. Two provisions are of particular importance. Paragraph 1(a) omits the word "exclusive" and precisely limits the territory subject to the franchise:

"1. (a) [PHILADELPHIA] SNELLING hereby grants to Licensee [Highlandtown Snelling] the right to use the registered tradename 'Snelling and Snelling', the Fort Snelling registered trademark,[2] and to be

[2]See footnote 1, *supra*.

identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called 'Licensee's business') to be conducted at an office located within the *following area: Bounded on the North by Pulaski Highway; on the East by Kresson Street; on the South by Eastern Avenue and on the West by Broadway. All located within the city of Baltimore."* (Emphasis added.)

For that portion of Paragraph 9 of Baltimore Snelling's agreement (which required Baltimore Snelling to waive any objections which it might legally have to the use of the Snelling name in other territories) Paragraph 1(c) was substituted in Highlandtown Snelling's agreement:

"1. (c) In connection with the operation of Licensee's business, Licensee shall use only the name 'Snelling and Snelling' and Licensee shall identify itself as a member of the Snelling and Snelling System, unless state law requires other or additional identification. SNELLING shall not grant to any other person, firm or corporation the right to use the name 'Snelling and Snelling' in connection with the operation of a personnel consulting and employment agency office within the area described in paragraph 1(a) hereof; *provided, however, that in the event SNELLING shall open offices or grant such right to others outside the described area but within the State where Licensee's office is located, Licensee does hereby release and waive any objection to the use of the name 'Snelling and Snelling' in connection therewith."* (Emphasis added.)

Drossner paid no franchise fee for Highlandtown. Robert O. Snelling, president of Philadelphia Snelling, testified that it was not his company's policy to exact a franchise fee for the opening of a second office in a territory already franchised, but because of Highlandtown's close proximity to the Essex-Dundalk industrial complex, he believed that there was a possibility that the value of a Dundalk-Essex

franchise might be prejudiced by the close proximity of another office. Consequently, Baltimore Snelling was required to amend its 1960 agreement, with the result that a 7% override with no allocation for national advertising was substituted for the earlier override of 5% and a 2% contribution to Philadelphia Snelling's national advertising budget.

On 28 January 1964, Drossner and Stanley Sackett entered into an agreement with Philadelphia Snelling for the licensing of an office in Towson. The franchise fee was $3,000; the agreement, substantially similar to Highlandtown Snelling's, except that the territory was described as "the city of Towson, Maryland, as of this date"; and on 16 March 1964, the agreement was assigned, with Philadelphia Snelling's consent, to Snelling and Snelling of Towson, Inc. (Towson Snelling). On 14 June 1965, Philadelphia Snelling again entered into a substantially similar agreement[3] with Snelling and Snelling of Glen Burnie, Inc. (Glen Burnie Snelling). A franchise fee of $2,600 was paid for a territory described as "the city limits of Glen Burnie, Maryland as of this date."

It is interesting to note that the ownership of the several franchises was not identical: Baltimore was owned by Drossner and his wife (50%) and Bert H. Cohen and his wife (50%); Highlandtown, entirely by Drossner and his wife; Towson, by Drossner (50%) and Sackett (50%); and Glen Burnie, by Drossner and his wife (50%) and Robert L. Cobaugh (50%). Because Snelling and Snelling appears in each of the corporate titles, Baltimore Snelling's consent was required in order for Highlandtown, Towson and Glen Burnie to be incorporated, as contemplated by Paragraph 9 of the agreement of 5 July 1960, and was given to the State Department of Assessments and Taxation.

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[3]This agreement provided for minimum annual overrides, however.

On 4 November 1965, Angelo R. Mascaro, the appellant here and one of the defendants below, entered into a licensing agreement with Philadelphia Snelling for a franchise in the Dundalk-Essex area of Baltimore County, for which he paid a franchise fee of $7,800. The territory was described in detail[4] and the franchise is hereafter referred to as "Dundalk-Essex Snelling." Except for the fact that the agreement was with an individual, it was substantially similar to Glen Burnie Snelling's, and included Paragraph 1(c).

Dundalk-Essex Snelling opened an office at 809 Eastern Boulevard in Baltimore County (and about 4 miles from Highlandtown Snelling) on 2 January 1966 and five days later Baltimore Snelling instituted suit.

The suit was brought in equity against Mascaro, the A. S. Abell Company (publishers of the Baltimore "Sun") and Chesapeake and Potomac Telephone Company,[5] on grounds of unfair competition. The bill of complaint alleged that Baltimore Snelling had since 17 August 1960, conducted business as an employment agency under the name "Snelling and Snelling" and had extensively advertised such name; that Drossner, the president, director and a stockholder in Baltimore Snelling was also an officer, director and shareholder in Towson Snelling, Highlandtown Snelling and Glen Burnie Snelling, also employment agencies trading under the same name with the consent of Baltimore Snelling. The bill further alleged that defendant, Angelo R. Mascaro had applied for an employment agency license indicating he would trade under the name "Snelling and Snelling" and had advertised under such name. The bill alleged that

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[4] "Outside of and East of Baltimore, In the State of Maryland, starting at the city limits of Baltimore East and South of Hwy. 40 to Hwy. 700 (Martin Blvd.), East and South of Hwy. 700 (Martin Blvd.) to Eastern Blvd. (Hwy. 150) South and East on Eastern Blvd. (Hwy. 150) to Wilson Blvd. (Hwy. 587) South and West of Wilson Blvd. (Hwy. 587) as per map attached."

[5] It was ultimately dismissed as to the latter two defendants.

Mascaro sought to mislead the general public and take advantage of the good-will in the name "Snelling and Snelling" that Baltimore Snelling allegedly had established by advertising. Claiming that its trade name had been damaged and that Mascaro was unfairly competing, Baltimore Snelling sought a temporary and permanent injunction restraining Mascaro from using the name "Snelling and Snelling." The bill also sought injunctions against The Abell Company and the Telephone Company restraining them from accepting advertisements from Mascaro under the name "Snelling and Snelling." An ex parte injunction dated 7 January 1966 was issued restraining the defendants as prayed but granting leave to move for a hearing within two days. On 15 January 1966, another order was signed extending the injunction for a period of ten days on the petition of Baltimore Snelling alleging that no service had as yet been made on Angelo Mascaro.

On 17 January 1966, Mascaro moved to dissolve the ex parte injunction, alleging that he was a licensee of the parent organization, Philadelphia Snelling, the same corporation that had licensed Baltimore Snelling. Mascaro contended that under his contract he had been granted the right to the use of the name "Snelling and Snelling" in connection with an office to be opened in the territory in Baltimore County described in his agreement.

After a hearing on Mascaro's motion, an interlocutory order was entered on 2 February 1966, dissolving the ex parte injunction and granting Mascaro the right to the use of the name "Snelling and Snelling" in connection with his office but requiring him to add as a suffix to his advertising and material distributed to the public, the words "of Dundalk-Essex A. R. Mascaro" in the same type as the words "Snelling and Snelling," and also the words "not connected with any other Snelling and Snelling office in this area."

Thereafter an answer was filed by Mascaro, and the case went to trial.

At trial Baltimore Snelling contended that through its prior use and advertising it had acquired the common law right to the exclusive use of the name "Snelling and Snelling" in the Baltimore metropolitan area. Mascaro contended that both he and Baltimore Snelling were licensees of Philadelphia Snelling, and that the parties' rights to the name were governed by their respective contracts with Philadelphia Snelling. By virtue of these contracts Mascaro said he had the right to open an office in the Dundalk-Essex territory as described in his contract and to use the name "Snelling and Snelling" in connection therewith and Baltimore Snelling's contract granted it the right to open an office in Baltimore, Maryland and use the name in connection therewith.

Baltimore Snelling replied, saying that its contract gave it the exclusive right to use the name in Baltimore City and Baltimore County.

In its opinion, the trial court found that Baltimore Snelling had no common law right to the use of the name Snelling and Snelling and that its right to use of the name derived from its license agreement with Philadelphia Snelling. It further found that the words "Baltimore, Maryland" in the contract between Baltimore Snelling and Philadelphia Snelling meant Baltimore City. However, the court went on to rule that by virtue of its contract, Baltimore Snelling had the exclusive right to the use of the name "Snelling and Snelling," in Baltimore City, and, therefore, while not denying defendant Mascaro the right to the use of the name "Snelling and Snelling" the court enjoined Mascaro from using the name unless he added a suffix to distinguish himself from Baltimore Snelling. Specifically, the court's decree enjoined Mascaro from using the name "Snelling and Snelling" in advertisements, materials distributed to the public, license applications and income tax returns

> "unless he includes the identifying designation 'of Dundalk-Essex, A. R. Mascaro', or '(Dundalk-Essex)'

'A. R. Mascaro', immediately following said name (and, in the advertising and listing referred to in (a) and (b) above, in the same size type, print or lettering as said name if the use of said name is in typed, printed, written or other graphic form) and the explanatory words 'not connected with any other Snelling and Snelling office in this (or 'the Baltimore') area, or '(not connected with any other Snelling and Snelling office)' in a prominent place therein, except that said Angelo R. Mascaro, one of the defendants, be and he is hereby relieved of the necessity of including said identifying designation and explanatory words in connection with the use of said name 'Snelling and Snelling' (or 'Snelling & Snelling') on the door to the office of his said employment agency business."

It is from this decree that Mascaro appealed, on the ground that the injunction was unwarranted, and Baltimore Snelling appealed, arguing that the injunction should have been absolute, that Baltimore Snelling's rights to the use of the name extended beyond Baltimore City, and that the injunction should have issued against the A. S. Abell Company and the Telephone Company.

One of the operational manuals prepared by Philadelphia Snelling for the use of its franchisees, and admitted as an exhibit at the trial below, contains the statement "Snelling and Snelling now humorously regards itself as the Howard Johnson of the personnel field." Even if spoken in jest, this is the core of the controversy. In 1960, when Baltimore Snelling received its franchise, Philadelphia had licensed between 40 and 50 franchisees. At the time this case came to trial, there were approximately 280 licensees in the United States, Canada and Argentina. The basic philosophy of the multiple franchise operation, amply evidenced by the terms of the licensing agreements, the operational manuals, and the form of both national and local advertising, is the creation of a monolithic system in which individual franchisees exchange personal identity for total anonymity, and wrap themselves in the cloak of "Snelling

and Snelling, Inc.," "Pioneers in Personnel," "Offices Coast to Coast," "The World's Largest Personnel System."[6]

Baltimore Snelling's display advertisement in the classified telephone directory typified this idea. In large type, it began:

"SNELLING AND SNELLING
The Largest and Most Comprehensive Personnel System In The Nation
BRANCH OFFICES - COAST TO COAST"

The advertisements which Baltimore Snelling inserted in the classified section of the Baltimore "Sun" followed the same format.

"SNELLING
AND
SNELLING

THE NATION'S LARGEST
PERSONNEL SYSTEM

200 offices coast to coast
Either office to serve you

Downtown
* * *
Towson
* * *
Glen Burnie
* * *
Highlandtown

[Then followed a list of job opportunities]

SNELLING & SNELLING"

Baltimore Snelling reads the provision of the license agreement of 5 July 1960, which grants

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[6]Mascaro's statement, "We have five offices in the Baltimore area," made in a telephone conversation with Drossner's secretary, about which Baltimore Snelling complains, is entirely consistent with this concept.

> "the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. in connection with one office only to be opened by Licensee in Baltimore, Maryland"

to mean that Dundalk-Essex Snelling is prohibited from listing its telephone in the Baltimore telephone directory (which contains listings for subscribers in Dundalk and Essex); from advertising in Baltimore newspapers or on Baltimore radio and television stations and perhaps from advertising in newspapers which circulate in Baltimore or Baltimore County or on radio or television stations heard there. In its cross appeal, Baltimore Snelling challenges the lower court's decree because it falls short of this goal and fails to enjoin the A. S. Abell Company and the Telephone Company from accepting such advertising.

In support of this contention Baltimore Snelling insists that "Snelling and Snelling" has acquired a secondary meaning in Baltimore, by dint of Baltimore Snelling's extensive program of newspaper, radio and television advertising, costing "well over $100,000."

The chancellor concluded, and we agree, that Baltimore Snelling's use of the name "Snelling and Snelling" is based on its rights under the agreement of 5 July 1960, and not on a common law right, since the name acquired no secondary meaning as a result of Baltimore Snelling's use of it; that by contract, Baltimore Snelling was given the exclusive right to use the name "Snelling and Snelling" in connection with its office in Baltimore, Maryland; and that Baltimore, Maryland, as used in the agreement, means the corporate limits of Baltimore City.

We agree, however, with the appellant's argument, that the grant of an "exclusive" right to use the name "Snelling and Snelling" *in connection with one office in Baltimore* is not an unrestricted right. Philadelphia Snelling retained a right, and could assign to others the right, to use the name in Baltimore in ways not connected with the Baltimore office. To hold otherwise would give rise to the conclusion

that Baltimore Snelling might, if it wished, prevent Philadelphia Snelling from advertising in national magazines which circulated in Baltimore. This was clearly not intended by anyone.

The agreement of 5 July 1960 between Philadelphia Snelling and Baltimore Snelling provided that it was to "be construed in accordance with the laws of the Commonwealth of Pennsylvania." Where contract language is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids. *Sternbergh v. Brock*, 225 Pa. 279, 74 Atl. 166 (1909); *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957). Words are to be given their ordinary meaning *Pines Plaza Bowling, Inc. v. Rossview, Inc.*, 394 Pa. 124, 145 A.2d 672 (1958). However, if the language under consideration is ambiguous or uncertain a court must then determine the intention of the parties. In such a case a court may consider evidence of extrinsic factors: *i.e.*, negotiations of the parties, the circumstances surrounding execution of the contract, the parties' own construction of the contract and the conduct of the parties. *DeMoss v. Beryllium Corporation*, 358 Pa. 470, 58 A.2d 70 (1948); *Sternbergh v. Brock, supra; Kennedy v. Erkman, supra.*

The lower court also found that the licensing of Dundalk-Essex Snelling by Philadelphia Snelling permitted the invasion by one licensee of another's territory and that this invasion and the resulting confusion mounted up to unfair competition, entitling Baltimore Snelling to equitable relief. We agree that an element of confusion was introduced by the licensing of Dundalk-Essex Snelling. We concede that Dundalk-Essex Snelling gained access to the communications media located in Baltimore; but we do not agree that this was the degree of confusion or the sort of invasion which warrants the granting of relief, as a matter of law.

There is ample authority for the proposition that a trade name may seldom be licensed or assigned, except as an incident to the sale of a business or of its good will. *Gault v. Wagner*, 227 Md. 521, 525, 177 A.2d 691 (1962); Nims,

The Law of Unfair Competition and Trademarks, 4th Ed. 1947, §§ 17, 22. The reason for the rule is that such transactions are likely to break the continuity of business reputations on which customers are likely to rely. *Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corp.*, 105 F.2d 908, 909 (2d Cir.), *Cert. Denied*, 308 U.S. 616 (1939), and result in confusion and deception. Nims, *supra*, § 17 at 86. There is an exception, however, "A trade name, like a trademark, may be assigned, as long as it remains associated with the same product or business with which it has become associated in the public mind * * * And upon the same conditions it may be licensed or lent, and its exclusive use may be resumed by its owner according to the terms of the lending." *Cardinal v. Taylor*, 302 Mass. 220, 19 N.E.2d 58, 59 (1939). For, as stated in *Corkran Hill & Co. v. A. H. Kuhlemann Co.*, 136 Md. 525, 533, 111 A.2d 471 (1920),

> "It may be enough that they [the articles] are manufactured for him, that he controls their production, or even that they pass through his hands in the course of trade, and that he gives to them the benefit of his reputation, or of his name and business style."

Or, as was said in *Gault v. Wagner*, 227 Md. 521, 526, 177 A.2d 691 (1962): "She [the licensor] is in a position to judge the quality of the work, and to exert a measure of control, through the right to terminate the license at will." *See also, Howard D. Johnson Co. v. Robbins Light, Inc.*, 328 Mass. 46, 101 N.E. 2d 348 (1951).

In a case involving a multiple-licensing arrangement similar to the one here involved, *Arthur Murray, Inc. v. Horst*, 110 F. Supp. 678, 679 (D. Mass. 1953), the court said:

> "In the light of the provisions of the agreement as set forth, it appears * * * that 'precautions were taken to insure that the Arthur Murray name would continue to indicate to the public what it had in the past, namely, a type of instruction conforming to

> the standards and methods of Arthur Murray'. It is plain we are not dealing here with a naked license."

See also, E. I. duPont de Nemours & Co. v. Celanese Corp., 167 F.2d 484, 489, 35 C.C.P.A. (Pat.), 1061, 3 A.L.R. 2d 1213 (1948).

Having satisfied ourselves that the granting of the license was valid; that the licensor, having retained broad control, could fix the conditions, delineate the territory, and recover its rights on breach or termination, *Howard D. Johnson Co. v. Robbins Light, Inc., supra,* we turn to a consideration of the element of unfair competition.

As Judge Delaplaine, speaking for this Court, said in *Edmondson Vil. Theatre, Inc. v. Einbinder,* 208 Md. 38, 43-44, 116 A.2d 377 (1955):

> "Like most doctrines of the common law, the law of unfair competition is an outgrowth of human experience. The rules relating to liability for harm caused by unfair trade practices developed from the established principles in the law of torts. These rules developed largely from the rule which imposes liability upon one who diverts custom from another to himself by fraudulent misrepresentation that the goods he is offering are the goods produced by the other. In England this type of fraud is commonly called 'passing off' or 'palming off' one's goods as those of another.
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> "The American Law Institute made the following comment in 3 *Restatement, Torts,* ch. 35, pages 539, 540, on this constantly developing doctrine:
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> 'The law has not yet developed a complete generalized standard for measuring trade practices like the standard of reasonable care in negligence. In part this is due to differing standards of commercial morality in the various industries; in part it is due to the fact that this branch of the law developed eclectically from the law dealing with

> the older wrongs which were not directly related to trade practices and competition. But the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade.'"

A definitive discussion of recent developments in the field can be found in "Developments in the Law—Trade Marks and Unfair Competition" 68 Harv. L. Rev. 814 (1955).

Parkway Baking Company v. Freihofer Baking Co., 255 F.2d 641 (3d Cir. 1958) involved the question of competition between licensees in a multiple licensing arrangement. In that case, National Bakers Service, Inc., which owned a secret formula for baking low calorie bread and the trade mark "Hollywood", granted to Parkway an exclusive license to bake and sell Hollywood bread in a carefully defined area in Greater Philadelphia. Freihofer held the license for the territory, including the city of Allentown, immediately north of Parkway's. For a time, both Parkway and Freihofer sold to American Stores in their respective territories. American, desiring to deal with a single supplier, commenced to purchase its entire requirements from Parkway, which made deliveries to American's Philadelphia warehouse, although some of the bread was ultimately reshipped to American Stores in Freihofer's territory. Freihofer retaliated by making deliveries of Hollywood bread baked by him to a controlled distributor who took delivery of the bread in Allentown and redelivered to customers in Philadelphia. The court held that Parkway's sale to American in Philadelphia did not violate its license to bake and sell bread in Philadelphia, but that Freihofer's retaliatory sales, not being made in good faith, were a violation of its franchise. In so holding, the court construed the provisions of Parkway's license agreement in accordance with its literal terms[8] and

[8] While the court held that the contract was to be interpreted under the law of Illinois, it concluded that Pennsylvania law was the same.

concluded that there had been no invasion of Freihofer's territory.

The doctrine of confusion, relied on by the lower court in the case before us is of relatively recent development. Originally, unfair competition consisted of "passing off" or "palming off" one's goods as those of another through the practice of deception. As the law developed, proof of fraudulent deception was no longer essential for relief, and this is the Maryland rule. *Edmondson Vil. Theatre, Inc. v. Einbinder, supra,* and at the same time, the earlier cases, holding that lack of competition between the parties was a defense, were being overruled. *Compare Borden Ice Cream Co. v. Borden's Condensed Milk Co.,* 201 F. 510, 514 (7th Cir. 1912), *with Ward Baking Co. v. Potter-Wrightington,* 298 F. 398 (1st Cir. 1924).

In the course of this development, confusion came to be recognized as a ground for equitable relief, even in the absence of deception or direct competition. For the complaining party to obtain injunctive relief on grounds of confusion, in cases where a trade name is at issue, the existence of a secondary meaning must be established, *National Shoe Stores Co. v. National Shoes of New York, Inc.,* 213 Md. 328, 131 A.2d 909 (1957); *Baltimore Bedding Corp. v. Moses,* 182 Md. 229, 34 A.2d 338 (1943); Nims, *op. cit.,* § 334; Annot. 150 A.L.R. 1067. In the absence of a finding of secondary meaning, there must be proof of deception. *National Shoe Stores Co. v. National Shoes of New York, Inc., supra; Drive It Yourself Co. v. North,* 148 Md. 609, 614, 130 A. 57 (1925); *Afro-American Owls v. Talbot,* 123 Md. 465, 91 A. 570 (1914); Annot. 150 A.L.R. 1067. In the case before us, the court below found no evidence that the name "Snelling and Snelling" had acquired a secondary meaning in consequence of its use by Baltimore Snelling. With this we agree, since should we conclude that a secondary meaning had been developed, it follows that it had been developed by Philadelphia Snelling, and that Baltimore Snelling and Dundalk-Essex Snelling were derivative beneficiaries of the secondary

meaning by virtue of their license agreements. While the lower court found that "destructive competition" and "confusion" existed, there was no direct finding of fraud or deception, nor would such a finding have been supported by the evidence.

A multiple franchise operation of the sort conducted by Philadelphia Snelling is a comparative newcomer to the business world. Philadelphia Snelling cites Howard Johnson as comparable, but others readily suggest themselves: Quality Court, Holiday Inns, Arthur Murray Dance Studios, and Sunkist Oranges are typical.

Adopting the characterization contained in the opinion in *Quality Courts United, Inc. v. Quality Courts, Inc.*, 140 F. Supp. 341 (M.D.Pa. 1956), "Snelling and Snelling," like "Quality Courts" could be regarded as a collective trade name,[9] analogous to the collective marks[10] registerable under the Lanham Act, 15 U.S.C.A. 1054, which are used in connection with the services of any person other than the owner to certify the quality and characteristics of the services. *See also, Huber Baking Company v. Stroehmann Bros. Co.*, 252 F.2d 945 (2d Cir.), *Cert. Denied*, 358 U.S. 829 (1958).

While the contractual arrangements and legal relationships between the multiple licensees may vary, all multiple franchise operations have one element in common—the complete subordination of the identity of the individual owner or operator to the group image. The "confusion" of which Baltimore Snelling complains is not only a natural result, but may even be a desired product of the structure, and must be sharply differentiated from the situations considered by this Court in *A. Weiskittel & Son Co. v. Harry C. Weiskittel Co.*, 167 Md. 306, 173 A. 48 (1934) and *Neubert v. Neu-*

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[9]It was registered as a service mark in 1961.

[10]These were unknown at common law. Nims, *supra*, § 22, at 130. *But cf.* Keebler Weyl Baking Co. v. J. S. Ivins' Son, Inc. 7 F. Supp. 211 (E.D.Pa. 1934).

bert, 163 Md. 172, 161 A. 16 (1932). No better example of the monolithic facade of the Snelling "system" can be found than in Drossner's own operation. His advertising would leave the uninformed to believe that Baltimore, Highlandtown, Towson and Glen Burnie are integral parts of a nation-wide system, which they are, for there is nowhere in the advertising an intimation that each of the four offices is a separately organized and owned business entity.

In recent times, the doctrine of unclean hands which Dundalk-Essex Snelling asserted in its answer has been regarded as a doctrine applied for the protection of the court and not of the parties, *Space Aero Products Co. v. R. E. Darling Co., supra*, 238 Md. at 120, and is seldom a defense available in an unfair competition action. Chafee, "Coming Into Equity With Clean Hands," 47 Michigan L. Rev. 1065, 1076-1080 (1949). The case which denied relief to the manufacturer of "Balm of Thousand Flowers" soap, which contained no flowers;[11] to the formulator of "California Fig Syrup," which contained no figs;[12] and the probbem faced by this Court in the He-No Tea case, where a blend of tea sold as "the kind of tea the Chinese drink" was shown to be unknown in China,[13] in today's world would be resolved on broader equitable grounds. As Judge Learned Hand said in the Second Circuit's opinion in *Dwinell-Wright Co. v. White House Milk Co.*, 132 F.2d 822, 825 (2d Cir. 1943): "Here, as often, equity does not seek for general principles, but weighs the opposed interests in the scales of conscience and fair dealing." Putting this another way, equitable estoppel may bar the relief sought. In the *White House* case, the complainant knew of the defendant's use of the brand name on its cans of evaporated milk, and was selling White House tea and coffee to the defendant for resale. In

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[11] Fetridge v. Wells, 13 How. (N.Y. Pract.) 385, 389 (Superior Ct. 1857).

[12] Worden v. California Fig Syrup Co., 187 U.S. 516, 528 (1903).

[13] Kenny v. Gillet, 70 Md. 574, 17 A. 499 (1889).

denying relief, the court said " * * * the owner may have so conducted himself as impliedly to assure the newcomer that he does not object, and the newcomer may have built upon that assurance." 132 F.2d at 825.

Or, as was said in *Holly Hill Citrus Growers' Assn. v. Holly Hill Fruit Products, Inc.*, 75 F.2d 13, 17 (5th Cir. 1935):

> "There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did."

We think that principle applies here. Drossner is estopped from challenging the validity of a licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie. To permit him to do so would be to sanction the weaving of the very web of broader exclusivity which he failed to achieve by contract. Baltimore Snelling's bill of complaint should have been dismissed.

DECREE REVERSED; INJUNCTION VACATED; COSTS TO BE PAID BY THE APPELLEE.

APPENDIX B

DISSENTING OPINION IN THE COURT OF APPEALS OF MARYLAND[2]

[Caption Omitted in Printing]

HAMMOND, C.J.
HORNEY
MARBURY
BARNES
SINGLEY,
JJ.

DISSENTING OPINION BY BARNES, J.

Filed: May 31, 1968

Barnes, J., dissenting:

I dissent because in my opinion (1) the Chancellor's construction of the licensing agreement of July 5, 1960, was correct, and (2) the defense of estoppel, although sound as an abstract principle, is not applicable and, in any event, is not available in this case because it was not raised in the lower court and was not briefed by the appellant in this appeal.

1.

The Chancellor, in my opinion, correctly construed the licensing agreement of July 5, 1960, as an agreement by Philadelphia Snelling to grant to Baltimore Snelling the *exclusive* right to use the name Snelling & Snelling in Baltimore City. This exclusive right was to be used in connection with one office only which was to be opened by Baltimore Snelling in Baltimore City. As I read paragraph 1(a) this is what the licensing agreement states. This is confirmed, in my opinion, by the provisions of paragraph 9 of the licensing agreement whereby Baltimore Snelling agreed when

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[2]This opinion appears at pages 25-34 of the certified transcript of record (R. 25-34) herein.

requested by Philadelphia Snelling to waive objections which Baltimore Snelling might legally have against the use of the name "Snelling and Snelling" in territories *other than the territory* granted to Baltimore Snelling.

It is well established that the primary source for determining the intention of the parties to a contract is the language used by the parties. *Kelley Construction Co. v. Washington Suburban Sanitary District,* 247 Md. 241, 230 A.2d 672 (1967); *Cadem v. Nanna,* 243 Md. 536, 221 A.2d 703 (1966). The words of the contract are to be understood in their plain, ordinary and popular sense, unless they have acquired a peculiar sense by trade usage or for some other cause. *Highley v. Phillips,* 176 Md. 463, 5 A.2d 824 (1939). It is only when the words of the contract, used in their ordinary sense, are vague, doubtful or ambiguous, that extrinsic evidence is admissible to determine the intention of the parties. *Coopersmith v. Isherwood,* 219 Md. 455, 150 A.2d 243 (1959). As pointed out in the majority opinion, the Pennsylvania law is to the same effect.

The Chancellor concluded that Baltimore Snelling acquired the legal right, by the terms of the licensing agreement, to the *exclusive* use of the name "Snelling and Snelling" in Baltimore City in connection with its office located in that area, that the operation of Mascaro, by soliciting and advertising, could not be effectively confined within his Dundalk-Essex franchise area without invading some sections of Baltimore City, and that this operation violated Baltimore Snelling's exclusive right to use the name "Snelling and Snelling" in its franchise area. In my opinion the Chancellor's conclusion was correct and carries into effect the intention of the parties to the licensing agreement as disclosed by the words of the contract itself. The purpose of the exclusive grant was to protect the franchisee from competition within the franchise area and this was a lawful provision.

The majority indicates that the exclusive right to use the name in Baltimore City in connection with one office in that City "is not an unrestricted right" and that "Philadel-

phia Snelling retained a right and could assign to others the right to use the name in Baltimore in ways not connected with the Baltimore office. To hold otherwise would give rise to the conclusion that Baltimore Snelling might, if it wished, prevent Philadelphia Snelling from advertising in magazines which circulated in Baltimore.". It was further stated "This was clearly not intended by any one." With great respect, this appears to me to beg the question. The language of the contract gives an unrestricted right against those who can *compete* with Baltimore Snelling, not against national advertising generally or advertising by franchisees who geographically cannot compete with Baltimore Snelling as a practical matter. There is no contention that Philadelphia Snelling could grant another franchise for another office to someone other than Baltimore Snelling in Baltimore City. It seems clear that Baltimore Snelling then has the exclusive right to use the Snelling name in Baltimore City in connection with that one office and no one else can be granted any right to use the name in Baltimore City in competition with Baltimore Snelling. The conclusion of paragraph 1(a) provides:

> "Licensee (Baltimore Snelling) shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall licensee [Baltimore Snelling] change its name without obtaining the written consent of Snelling [Philadelphia Snelling]; nor shall licensee [Baltimore Snelling] establish any branch or additional office without the written consent of Snelling [Philadelphia Snelling]."

This provision indicates that there are two prohibitions on the activities of Baltimore Snelling, (1) that only one office will be maintained that one in its *territory*, and (2) that there will be no change in its *name*. Paragraph 9 provides for waiver by Baltimore Snelling in territories *other than* the territory granted to Baltimore Snelling. This language clearly indicates that the territory granted to Baltimore Snelling is Baltimore City (it is the only *territory* mentioned in

paragraph 1) and there is no provision that there will be any waiver of objection to the use of the name "Snelling and Snelling" in *that territory*. This language confirms the exclusive nature of the grant to Baltimore Snelling.

Assuming, *arguendo*, that the licensing agreement is ambiguous, the extrinsic evidence, in my opinion, confirms the Chancellor's construction of the contract. When the licensing agreement was negotiated, the prior franchisees in the Baltimore area had failed badly in their operation, leaving a collection of unpaid bills and ill will behind them. The *name* "Snelling and Snelling" was at that point a liability rather than an asset. In short, the situation gave rise to a franchisee's "market," as it were, and Philadelphia Snelling was obliged to give Baltimore Snelling a licensing agreement most beneficial to the franchisee and at a small license payment in order to obtain a competent and qualified operator who would enter the unfortunate situation in Baltimore.

In addition to the specific situation in the Baltimore area, Philadelphia Snelling in 1960 had not enlarged its licensing operations to the substantial size it enjoys at the present time. Here again it was necessary to give favorable licensing agreements to its franchisees in order to build up its business at that time. It is significant that after the situation in Baltimore was rectified and Philadelphia Snelling's business had substantially expanded, a *different* form of contract from which the word "exclusive" was removed was used by Philadelphia Snelling, and more substantial original license payments were required. It seems clear that Philadelphia Snelling believed that there was a substantial legal difference between a licensing agreement containing the word "exclusive" and one from which that word was excluded. It is unreasonable to suppose that Baltimore Snelling would have proceeded to make the very substantial payments for advertising and other promotional items[1] if it had not believed that it had the exclusive right for which it had successfully bargained.

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[1] The testimony indicates that amounts up to $118,000.00 per year were spent on these items.

Then too, the licensing agreement of July 5, 1960, was prepared by Philadelphia Snelling. It is well settled that in the event of ambiguity in the contract, it is to be construed against the party preparing it. *Hughes & Co. v. Pioneer*, 230 Md. 36, 185 A.2d 383 (1962). Applying this maxim of construction to the licensing agreement, the ambiguity would be resolved against Philadelphia Snelling and the Chancellor's construction sustained.

2.

In the majority opinion, as an alternative ground for reversing the Chancellor's decree it is indicated that Baltimore Snelling is equitably estopped from challenging the validity of the licensing system which Drossner "used to his own advantage when he obtained the Towson and Glen Burnie franchises and from attempting to impose upon Mascaro limitations with respect to communications media he did not assert against Towson and Glen Burnie." Although the basic principle of estoppel is sound in a proper case, in my opinion, it is not applicable in the present case, as Drossner was *himself one of the principals* in the Towson and Glen Burnie franchises. The granting of these franchises was not injurious to the exclusive franchise granted to Baltimore Snelling inasmuch as a substantial part of the profits of their operation accrued to the principal in Baltimore Snelling. The obtention of the Glen Burnie and Towson franchises might possibly establish an equitable estoppel, prima facie, against Drossner in his contention that Baltimore Snelling's franchise included areas outside of Baltimore City, but it would not, in my opinion, operate as an estoppel to insist on the exclusive franchise as against Mascaro, a competitor. More importantly, it would seem that merely because Drossner permitted one person to infringe his exclusive franchise, he would not be prevented from enforcing that franchise against another infringement by a different person.

Assuming for the argument that the estoppel would otherwise be effective against Drossner, in my opinion the estoppel is not available to Mascaro in this case because it

was not raised, considered or passed upon by the Chancellor in the trial court and was not briefed or argued before us on this appeal.

It is indicated in the majority opinion that Mascaro in his answer to the bill of complaint asserted the defense that the plaintiff was guilty of "unclean hands" and the inference is that this affirmative defense sufficiently raised the question of estoppel. In my opinion, the raising of this affirmative defense does not raise the question of estoppel aganst Drossner by his acquisition as one of the principals of the Towson and Glen Burnie franchises. Paragraph 20 of the Mascaro answer alleges:

> "20. Further answering, Complainant is guilty of unclean hands in that the Bill of Complaint, which prayed under oath an ex parte injunction which was successfully obtained and then dissolved on motion of Defendant, fails to make a full and frank disclosure of all the facts, to wit, that both Complainant and Defendant are licensees of Snelling and Snelling, Inc., owners of the registered trade name "Snelling and Snelling" by virtue of contracts dated July 5th, 1960, and November 4th, 1965 respectively."

There is nothing alleged in paragraph 20 to suggest any estoppel of Drossner by having acquired, as one of the principals, the Towson and Glen Burnie franchises. The reference in paragraph 20 is to licenses acquired under the licensing agreements of Baltimore Snelling and Mascaro, dated July 5, 1960 and November 4, 1965 respectively. The Chancellor does not mention or pass upon any estoppel point in his written opinion and there is nothing concerning it in the final decree. The point is not mentioned in the briefs of the respective parties and the cases cited on this point by the majority are not cited. There was no argument before us on the point.

Under these circumstances the point is not available to Mascaro as a ground for reversal in this case. Maryland Rule 885 provides that this Court "will not ordinarily de-

cide any point or question which does not plainly appear by the record to have been decided by the lower court." In my opinion, the point was not presented to the lower court and I see no reason to decide the point here. See *Elko v. Elko*, 187 Md. 161, 49 A.2d 441, 168 A.L.R. 256 (1946).

Then too, we have rather consistently held that even if a point were raised and decided by the lower court, it will be deemed to be waived on appeal if the point is not briefed in this Court. *Harmon v. State Road Commission*, 242 Md. 24, 217 A.2d 513 (1966); *Meyers v. Chief of Baltimore County Fire Bureau*, 237 Md. 583, 207 A.2d 467 (1965). For this additional reason, the estoppel point is not available to Mascaro in this case as a ground for the reversal of the Chancellor's decree.

I would affirm the decree.

APPENDIX C

[Filed June 26, 1968, "Denied" June 28, 1968]

MOTION FOR REARGUMENT[3]

Now comes the appellee and cross-appellant, Snelling and Snelling of Baltimore, Inc., and respectfully moves the Court to grant reargument in this cause.

In these appeals, the appellant, Angelo R. Mascaro (referred to in the opinions herein as "Mascaro" or as "Dundalk-Essex Snelling" and hence hereinafter referred to in the same manner), sought to set aside an "explanatory phrase" injunction issued against him by the Chancellor below, enjoining him from using in Baltimore City the trade name "Snelling and Snelling" in connection with his employment agency business conducted from an office in Dundalk, in Baltimore County, adjacent to Baltimore City, unless he accompanied such use by a legend distinguishing his business from that of Snelling and Snelling of Baltimore, Inc. (referred to in the opinions herein as "Baltimore Snelling" and hence hereinafter referred to in the same manner), a prior user in Baltimore City of the name in issue, and Baltimore Snelling sought, in part, to extend the Chancellor's injunction to encompass an absolute prohibition against any use of the disputed name in Baltimore City by Mascaro, even if accompanied by explanatory language.

The Chancellor decided the issues below by construing a licensing agreement between Baltimore Snelling, as licensee, and Snelling and Snelling, Inc., a Pennsylvania corporation (referred to in the opinions herein as "Philadelphia Snelling" and hence hereinafter referred to in the same manner), as licensor. The Chancellor concerned himself particularly with construction of the portion of Baltimore Snelling's contract, contained in paragraph 1.(a) thereof, which granted to Baltimore Snelling

> "***the exclusive right to use the name Snelling and Snelling***in connection with one office only to

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[3]This motion appears at pages 35-47 of the certified transcript of record (R. 35-47) herein. The disposition of the motion is endorsed on the face thereof (at R. 35).

be opened***in Baltimore, Maryland." (Majority opinion, p. 3)

The Chancellor interpreted that language as granting to Baltimore Snelling the exclusive right to use the name involved in Baltimore City, such exclusive right to be used in connection with one office only in Baltimore City. The Chancellor found that Mascaro, as licensee under another agreement with Philadelphia Snelling, was by using the name "Snelling and Snelling" in Baltimore City unfairly competing with Baltimore Snelling. The Chancellor found that Mascaro's activities in Baltimore City, as, for instance, his advertising, though carried on from his office in Dundalk, infringed upon Baltimore Snelling's exclusive right. The Chancellor hence afforded Baltimore Snelling injunctive relief.

The majority of the Court, over the dissent of Judge Barnes, disagreed with the Chancellor's construction and reversed his decree. The majority of the Court held that Baltimore Snelling's "exclusive right to use the name" Snelling and Snelling "in connection with one office only" in Baltimore City was not really an exclusive right at all, not even so long as such use was connected with one office only in Baltimore City. The majority of the Court held, rather, that Baltimore Snelling's right was not exclusive, in the sense at least that it was "not an unrestricted right" (Majority Opinion, p. 13) and that Philadelphia Snelling hence retained "the right to use the name in Baltimore in ways not connected with the Baltimore office" (Majority Opinion, p. 13) and could assign that right to others, that is, in the instant cause, to Mascaro. The majority of the Court postulated as an additional premise for reversing the Chancellor's decree that Baltimore Snelling was precluded from securing the relief which it sought by an "equitable estoppel" (Majority Opinion, p. 20) said to operate against it because Maynard Z. Drossner (referred to in the opinions herein as "Drossner" and hence hereinafter referred to in the same manner), Baltimore Snelling's principal owner, had procured three other franchises ("Highlandtown Snelling", "Towson Snelling" and

"Glen Burnie Snelling"), in addition to Baltimore, from Philadelphia Snelling and Baltimore Snelling should hence not be heard to object because Mascaro had obtained Dundalk-Essex Snelling from the same source under the same system. Judge Barnes, in his dissent, said that in his opinion the Chancellor's construction of Baltimore Snelling's contract had been correct and that the estoppel point interposed by the majority of the Court was not properly in the case, since it had not been decided below, nor briefed nor argued in these appeals. He announced that he would affirm the Chancellor's decree.

THE GROUNDS FOR THIS MOTION

In addition to the reasons why the Chancellor's decree should at least have been affirmed by the Court, set out in its respective briefs as appellee and as cross-appellant herein, none of which Baltimore Snelling proposes to repeat herein, but upon all of which it continues to rely, Baltimore Snelling respectfully assigns as grounds for this motion and as additional reasons why reargument should be granted in this cause: (1) that the majority of the Court misconstrued the contract between Baltimore Snelling and Philadelphia Snelling and (2) that the majority of the Court improperly applied the estoppel defense against Baltimore Snelling, especially since the majority relied on that defense as a basis of decision without first affording Baltimore Snelling any opportunity to be heard thereon.

1. The majority of the Court misconstrued the contract between Baltimore Snelling and Philadelphia Snelling.

On the issue of the proper construction of the operative language of Baltimore Snelling's contract with Philadelphia Snelling, which granted to Baltimore Snelling "the exclusive right to use the name Snelling and Snelling***in connection with one office only***in Baltimore, Maryland" (Majority Opinion, p. 3), Baltimore Snelling respectfully submits that the necessary effect of the interpretation put upon that language by the majority of the Court is to place the Court in the position of having written a new contract for the parties,

one entirely different from that which they made for themselves. The difference arises particularly in that the parties to the contract appear to have agreed that Baltimore Snelling was to have the exclusive use of the name Snelling and Snelling "in connection with one office *only*" (emphasis added) in Baltimore, Maryland, while the majority of the Court appears to have revamped that agreement into one allowing Baltimore Snelling the exclusive use of the name in issue *only* "in connection with one office" in Baltimore, Maryland, a very grave and substantial change indeed.

If one allows the language quoted as restrictive a scope as may reasonably be attributed to it, still that language grants to Baltimore Snelling not "the exclusive right" to have "one office only" in Baltimore, Maryland, but the exclusive right "to use the name Snelling and Snelling" in Baltimore, Maryland. The only limitation on that right appearing from the language of the contract is that the use of the name must in some manner be connected with, that is be carried on "in connection with one office only***in Baltimore, Maryland". Certainly everything in the evidence in this cause establishes beyond any question whatsoever that the use made of the name Snelling and Snelling in Baltimore City by Baltimore Snelling was in fact "in connection with one office only" opened and conducted by Baltimore Snelling in Baltimore City. Baltimore Snelling hence urges that it has fulfilled all requirements reasonably to be elicited from the language used in its contract with Philadelphia Snelling. It should then be entitled to receive the benefit of the consideration for which it bargained and for which, as the record shows, it paid quite dearly, viz. the benefit of the *exclusive* use of the name in issue in connection with the one office which it maintains in Baltimore City.

Baltimore Snelling respectfully submits that the construction placed upon the quoted language by the majority of the Court totally changes the undertakings of the parties to the contract involved and entirely rewrites the most critical portion of the contract. It changes the contract from one

which grants to Baltimore Snelling "the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. in connection with one office *only* to be opened by licensee (Baltimore Snelling) in Baltimore, Maryland" (Majority Opinion, p. 3: emphasis added) to one which grants to Baltimore Snelling "the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. (*only*) in connection with one office ***to be opened by licensee (Baltimore Snelling) in Baltimore, Maryland" (Majority Opinion, p. 3; word in bracket and emphasis added). The transposition of the word "only" is the inescapable result of the interpretation placed upon the language quoted by the majority of the Court. The result is something vastly different from the result which the parties to the contract in question ever agreed upon or even contemplated.

Baltimore Snelling respectfully submits that the majority of the Court should not have rewritten its contract with Philadelphia Snelling. That the majority of the Court did so, however, is clear from the statement made in the majority opinion that

> "***the grant of an 'exclusive' right to use the name 'Snelling and Snelling' *in connection with one office in Baltimore* is not an unrestricted right. Philadelphia Snelling retained a right, and could assign to others the right, to use the name in Baltimore in ways not connected with the Baltimore office." (Majority Opinion, pp. 12-13) (Emphasis is the Court's.)

Baltimore Snelling respectfully submits that the aforegoing clearly amounts to a statement that Baltimore Snelling's acknowledged (even by the majority of the Court) "exclusive right" is one existing *only* in connection with one office in Baltimore, rather than one existing in connection with one office *only* in Baltimore. The latter is what Baltimore Snelling and Philadelphia Snelling agreed was to be the case and is what the Chancellor found their agreement to be (and Baltimore Snelling submits that his finding is supported by the record); the former is what the opinion of the majority

of the Court imposes upon Baltimore Snelling, contrary to its agreement.

And in doing that the majority of the Court appears to have chosen not to give effect to the salutary and well settled rule, referred to in Baltimore Snelling's brief as appellee herein and alluded to by Judge Barnes in his dissenting opinion "that in the event of ambiguity in the contract, it is to be construed against the party preparing it". (Dissenting Opinion, p. 6) Is the language of paragraph 1.(a) of Baltimore Snelling's contract so crystal clear and does it so compellingly and necessarily lead solely to the construction put upon it by the majority of the Court as to obviate entirely the construction placed upon it by the Chancellor below and by Judge Barnes here? With all deference to the opinion of the majority of the Court, Baltimore Snelling respectfully but strenuously urges that, if the language involved is clear at all, it clearly establishes not the interpretation put upon it by the majority of the Court, but the sense and meaning afforded to it by the Chancellor below and by the dissenting member of the Court here.

As Baltimore Snelling noted in its briefs and arguments earlier in this cause, the construction for which it contends and the construction which was adopted by the Chancellor and by Judge Barnes is just as readily available from the language of the contract as is the one contended for by Mascaro and adopted by the majority of the Court. But, Baltimore Snelling respectfully suggests, that very circumstance results in the existence of ambiguity in the contract. See, for instance, Webster's definition of "ambiguity" which reads in part, as follows:

> "*ambiguity****2. Ambiguousness in meaning arising from language admitting of more than one interpretation; ***" (Webster's New International Dictionary, Second Edition, Unabridged, p. 81).

See also Black's Law Dictionary, Second Edition, 1910, p. 64, Verbo "Ambiguity". Baltimore Snelling respectfully submits that it is entitled to the benefit of the more favor-

able to it of the two at least equally plausible constructions available from the patently ambiguous language of the contract provision in issue in this cause and that failure of the majority of the Court to recognize, deal with or mention the applicability vel non of the rule requiring such an approach to the language involved warrants reargument.

2. The majority of the Court improperly applied the estoppel defense against Baltimore Snelling.

As a basis for reversing the Chancellor's decree the majority of the Court also indicates that Baltimore Snelling is equitably estopped from attacking the licensing system which resulted in Mascaro's advent upon the scene in competition *in Baltimore City* with Baltimore Snelling. On this point the majority of the Court premises its position on a finding that:

> "***Drossner is estopped from challenging the validity of the licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie. To permit him to do so would be to sanction the weaving of the very web of broader exclusivity which he failed to achieve by contract. ***" (Majority Opinion, p. 21)

Aside from the reasons (all of which, without repeating them herein, Baltimore Snelling adopts) why the estoppel ground is not properly applicable to or available in this cause, advanced by Judge Barnes in his dissenting opinion, Baltimore Snelling respectfully submits that the action of the majority of the Court in deciding the issues herein involved even in part on a basis, i.e. the estoppel ground, as to which Baltimore Snelling was not afforded any opportunity to be heard is also a clear violation of the provisions of the Declaration of Rights, Article 23, Constitution of Maryland and of those of the Equal Protection and Due

Process Clauses of the Fourteenth Amendment to the Constitution of the United States and is repugnant to and deprives Baltimore Snelling of substantial rights and benefits guaranteed by those constitutional provisions and by each of them. That fundemental fairness which is requisite to the validity of an adversary proceeding in any court and which is essential to "due process" and implicit in the "law of the land" must include an adequate opportunity to be heard on an issue on which judgment is based. See the constitutional provisions cited. Cf. *Travelers Indem. Co. v. Nationwide Const. Corp.*, 244 Md. 401, 224 A.2d 285 (1966); *Burns v. Mayor and City Council of Midland*, 247 Md. 548, 234 A.2d 162 (1967); *Goodman v. Swenson*, 192 F.2d 669, C.A. Md., (1952).

Baltimore Snelling has no accurate means of measuring the importance of the estoppel premise to the process by which the majority of the Court reached the result attained in the instant cause, but Baltimore Snelling must assume that the estoppel issue had a substantial effect, especially since it is set out in the majority opinion and developed at some length therein. Certainly it had some effect. Otherwise no reason for raising it, much less discussing it in the opinion, would appear. And it is, of course, the fact that Baltimore Snelling had no opportunity whatsoever to argue the estoppel point, or to present to the Court any positions or authorities it might believe to be favorable to its views, since neither the existence nor efficacy of any estoppel defense was dealt with below, argued in Mascaro's briefs, spoken of in oral argument here or in any manner even mentioned in this cause prior to its interjection in the majority opinion.

Had it been afforded an opportunity, Baltimore Snelling might have made effective arguments. Some authority appears to exist to the effect that an estoppel defense, or defense akin to "equitable estoppel", may not be so readily available in circumstances similar to those prevailing in the instant cause. There is not, for instance, any showing in the record in this cause of an "unconscientious and inequitable

assertion of rights" by Baltimore Snelling, such as is referred to in *Johnson Lumber Co. v. Magruder*, 218 Md. 440, 147 A.2d 208, 212 (1958), as being the sort of conduct which equitable estoppel "was educed to prevent" (Id.). And see the discussion regarding equitable estoppel and its proper bases set out in *Travelers Indem. Co. v. Nationwide Const. Corp.*, supra, 224 A.2d 285, 292-294. Nothing whatever appears in the record to support any inference that anything done by Baltimore Snelling with respect to obtention or exercise of its franchise was in any way inconsistent, or had prejudiced or misled Mascaro. (The very activities relied upon by the majority of the Court as a basis for the estoppel directed against Baltimore Snelling are those of *Drossner* (Majority Opinion, p. 21), not Baltimore Snelling, and this despite that the majority earlier went to some length to establish that the ownership of the several franchises in which Drossner held financial interests was diverse rather than identical (Majority Opinion, pp. 5-6). Now, on the estoppel point, the majority charges Baltimore Snelling with what it considers to be the onus of Drossner's acts, even though Baltimore Snelling is the interested litigant, not Drossner, who is no more a party to the cause than is Philadelphia Snelling.) The presence of some such factors would seem essential to imposition of any estoppel against Baltimore Snelling. And see, regarding the availability vel non of a defense similar to estoppel as between a licensor and its licensed dealers, *Perma Life Mufflers, Inc. v. International Parts Corp.*, U.S. , 36 LW 4571 (1968) (No. 733, October Term, 1967, filed June 10, 1968), in which the Supreme Court, reversing the Court of Appeals for the Seventh Circuit, which had affirmed the District Court, held that the doctrine known by the Latin phrase *in pari delicto* was not a bar to a private antitrust action brought by licensees of Midas, Inc., operators of "Midas Muffler Shops", against their licensor and International Parts Corp., its parent organization, charging restraint of trade and suppression of competition. The Supreme Court noted that it found itself "in complete disagreement with the Court of Appeals" (36 LW

4572). It set out the position of the Court of Appeals as follows:

> "The Court of Appeals, agreeing with the District Court, held the suit barred because petitioners were *in pari delicto*. The Court noted that each of the petitioners had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had 'solemnly subscribed' to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. Under these circumstances, the Court of Appeals concluded, '(i)t would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine.' 376 F.2d, at 699." (36 LW 4572)

The position of the Court of Appeals for the Seventh Circuit, reversed by the Supreme Court, is not dissimilar, with respect to the circumstances under which it erroneously held the *pari delicto* doctrine to be applicable, from the position of the majority of this Court, with respect to the applicability of the equitable estoppel doctrine to Baltimore Snelling, as noted in the majority opinion, viz.:

> "***Drossner is estopped from challenging the validity of a licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie Franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie.***" (Majority Opinion, p. 21)

While Baltimore Snelling does not suggest that distinctions cannot be drawn between a private antitrust action and the instant cause, it respectfully submits that the case cited is sufficiently analagous to the instant one on the point under discussion to support its contention that the issue of

the applicability vel non of an estoppel defense here ought at least be quite closely examined, and after argument.

Respectfully submitted,

Benjamin Lipsitz,
Hyman K. Cohen,
Eleanor J. Lipsitz,
Attorneys for Appellee
and Cross-Appellant

[Certificate of Service omitted in printing]

APPENDIX D

[Filed Dec. 6, 1966]

[Caption Omitted in Printing]

OPINION OF THE CIRCUIT COURT NO. 2[4] OF BALTIMORE CITY

MEMORANDUM OPINION

HARRIS, J.:

This case concerns the right of the licensee of an employment agency franchise to resist the operation of a similar franchise by another licensee using the same nationwide name, in a geographical area immediately contiguous to that of the first franchise licensee, under the theory of either a common law ownership vested in the first franchise licensee or under his contractual rights with the licensor of the franchise.

Snelling and Snelling, Inc., a Pennsylvania Corporation having its principal office in Philadelphia (Snelling-Philadelphia), is the owner of a nationally known personnel consulting and employment agency. By contract, it has licensed numerous corporations and individuals to operate similar employment agencies in various sections of the nation under the trade name of "Snelling and Snelling", using its techniques, office procedures, business forms, trade name, and the trademark "Fort Snelling". The consideration for such a license usually consists of an initial lump sum payment by the licensee, plus 7% commissions or "overrides" on the gross monthly business of the licensee.

On July 5, 1960, Snelling-Philadelphia executed a contract with a newly formed licensee, Snelling and Snelling of Baltimore, Inc., a Maryland corporation (Snelling-Baltimore). Maynard Z. Drossner was the principal owner of

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[4]This opinion appears at pages 17-31 of Volume I of the printed "Joint Record Extract", which is indexed at page 2 of the certified transcript of record (R. 2) herein.

Snelling-Baltimore, and held the positions of president and treasurer of the new corporation. As of the date of the contract, Snelling-Philadelphia had granted several licenses to licensees in the suburbs of Philadelphia, but had not granted licenses to any other licensees operating in the suburbs of large urban or metropolitan areas. The contract with Snelling-Baltimore contained the following provision:

> "1. (a) SNELLING hereby grants to LICENSEE the *exclusive* right to use the name SNELLING and SNELLING and/or SNELLING and SNELLING of BALTIMORE, Inc. in connection with one office only to be opened by LICENSEE *in Baltimore, Maryland.* LICENSEE shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall LICENSEE change its name without first obtaining the written consent of SNELLING; nor shall LICENSEE establish any branch or additional office without the written consent of SNELLING." (italics added).

The contract further provided, *inter alia,* that Snelling-Baltimore was to pay $2,000 to Snelling-Philadelphia, plus an override of 5% on the gross monthly receipts of Snelling-Baltimore, plus an additional override of 2% of such receipts to be applied by Snelling-Philadelphia to its national advertising. Another part of the contract provided as follows:

> "LICENSEE and SHAREHOLDERS agree, when requested by SNELLING, to waive any and all objections LICENSEE may legally have against the use of the name "SNELLING AND SNELLING" in territories other than that territory granted to LICENSEE herein."

Snelling-Baltimore began operations in August of 1960. Largely due to the industry, imagination, and extensive advertising of Drossner, Snelling-Baltimore soon became a profitable business in the employment agency field. It is admittedly now the largest such agency in Maryland.

In 1962, Drossner wished to expand his business to include Towson, in Baltimore County, maintaining that he had been assured by Snelling-Philadelphia that his franchise territory included Baltimore County as well as Baltimore City; that Towson was, in effect, a suburb of Baltimore City; and that it was part of the "metropolitan area" contemplated by the parties when the contract was signed. The evidence shows that these efforts were consistently resisted by Snelling-Philadelphia, and that the latter relied upon the literal wording of the Snelling-Baltimore contract to confine the franchise area to the geographical limits of Baltimore City.

After extensive negotiations, Snelling-Philadelphia and Drossner executed contracts whereby the latter was granted franchises to operate two additional offices—one in the Highlandtown section of Baltimore City, and one in Towson. A brief description of these contracts follows.

On December 20, 1963, Snelling-Philadelphia executed a contract with a newly formed corporation known as Snelling and Snelling of Highlandtown, Inc. (Snelling-Highlandtown), organized and operated by Drossner and owned by his wife and him. This contract contains the following pertinent provisions:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename "Snelling and Snelling", the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called "Licensee's business") to be conducted at an office located within the following area: Bounded on the North by Pulaski Highway; on the East by Kresson Street; on the South by Eastern Avenue and on the West by Broadway. All located within the city of Baltimore."
>
> "(c) In connection with the operation of Licensee's business, Licensee shall use only the name "Snelling and Snelling" and Licensee shall identify itself as a member of the Snelling and Snelling Sys-

> tem, unless state law requires other or additional identification. SNELLING shall not grant to any other person, firm or corporation the right to use the name "Snelling and Snelling" in connection with the operation of a personnel consulting and employment agency office within the area described in paragraph 1(a) hereof; provided, however, that in the event SNELLING shall open offices or grant such right to others outside the described area but within the State where Licensee's office is located, Licensee does hereby release and waive any objection to the use of the name "Snelling and Snelling" in connection therewith."

This contract did not provide for the payment of any initial lump sum amount by Snelling-Highlandtown to Snelling-Philadelphia. The compensation to the latter was to be a flat 7% of the gross monthly receipts from the operation of the licensee's business, with no obligation on Snelling-Philadelphia to use any part thereof for national advertising. As consideration for the omission of a lump sum payment for the Highlandtown franchise, Snelling-Philadelphia exacted from Snelling-Baltimore an agreement that the total 7% overrides in the Snelling-Baltimore contract (5% plus 2% for national advertising) should henceforth become a single 7% payment with no allocation for national advertising.

On January 28, 1964, Snelling-Philadelphia executed a contract with Drossner and Stanley Sackett, providing for the opening of a Snelling and Snelling office in Towson. This contract provided that:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename "Snelling and Snelling", the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called "Licensee's business") to be conducted at an office located within the following area: the city of Towson, Maryland as of this date."

This contract also contained a paragraph 1(c) identical to the one in the Highlandtown contract, and which is quoted above verbatim.

The Towson contract also provided that the licensees should pay Snelling-Philadelphia a lump sum of $3,000, plus 7% of the gross monthly receipts from the operation of the business.

It is to be noted that there are at least two significant changes between the Baltimore and the two Highlandtown and Towson contracts. First the Highlandtown and Towson contracts omit the word "exclusive" from the description of the right to use the name "Snelling and Snelling" within the designated franchise area. Second, the 7% "overrides" are not allocated between a general 5% override and a 2% override to be specifically applied by Snelling-Philadelphia to "national advertising".

On March 16, 1964, the Towson contract was assigned by Drossner and Sackett to a newly formed corporation known as Snelling and Snelling of Towson, Inc. (Snelling-Towson). This assignment was approved by Snelling-Philadelphia.

On June 14, 1965, Snelling-Philadelphia executed a contract with the newly formed corporation of Snelling and Snelling of Glen Burnie, Inc. (Snelling-Glen Burnie) Drossner was also the organizer of Snelling-Glen Burnie, although Robert L. Cobaugh was listed as president and as a shareholder along with Mr. and Mrs. Drossner. The Snelling-Glen Burnie contract included the same paragraphs 1(a) and 1(c) which are contained in the Highlandtown and Towson contracts, except that the franchise area is designated as "the city limits of Glen Burnie, Maryland". The Glen Burnie contract also provided for a lump sum payment to Snelling-Philadelphia of $2,600, plus the usual 7% override of the gross monthly receipts of the licensee's business.

About five months later, on November 4, 1965, Snelling-Philadelphia executed a contract with the defendant, Angelo

R. Mascaro, to operate a Snelling and Snelling office in the Dundalk-Essex area of Baltimore County, several miles from the office of Snelling-Highlandtown. The franchise area of the Mascaro contract is described as follows:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename "Snelling and Snelling", the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called "Licensee's business") to be conducted at an office located within the following area: Outside of and East of Baltimore. In the State of Maryland, starting at the city limits of Baltimore East and South of Hwy. 40 to Hwy. 700 (Martin Blvd.), East and South of Hwy. 700 (Martin Blvd.) to Eastern Blvd. (Hwy. 150) South and East on Eastern Blvd. (Hwy. 150) to Wilson Blvd. (Hwy. 587) South and West of Wilson Blvd. (Hwy. 587) as per map attached."

The Mascaro contract also included the same paragraph 1(c) that is contained in Drossner's Highlandtown, Towson, and Glen Burnie contracts with Snelling-Philadelphia. It also provided for payment by Mascaro to Snelling-Philadelphia of a lump sum of $7,800, plus the monthly overrides of 7% on Mascaro's gross monthly receipts.

Shortly thereafter, on January 7, 1965, Snelling-Baltimore filed the bill of complaint in this case against Mascaro, The A. S. Abell Company, and the C. & P. Telephone Company of Maryland. The bill of complaint alleges, *inter alia*, that from July 5, 1960 to the date on which the bill of complaint was filed, Snelling-Baltimore had made extensive investments in advertising; that, through its efforts, it had built a substantial business which had become well known in the Baltimore area under the exclusive trade name of "Snelling and Snelling"; and that, without the plaintiff's prior knowledge, Mascaro had filed an application with the State Department of Labor and Industry for a Maryland

employment agency license to transact business under the trade name of "Snelling and Snelling". The bill of complaint further alleges that Mascaro's actions were "willful and deliberate acts to establish a business in competition" with the plaintiff in the same market, with the intention of capitalizing on the valuable trade name which the plaintiff had popularized through substantial investments; that he had deliberately misled and confused the general public to take advantage of the plaintiff's pre-eminent position in the employment agency field; that the plaintiff "is suffering substantial damage in that the value of its trade name is being injured"; and that the plaintiff would continue to suffer immediate, substantial, and irreparable damage unless Mascaro was enjoined from "further infringement" upon the rights of the plaintiff. The bill of complaint prayed for a temporary and permanent injunction restraining Mascaro from using the name "Snelling and Snelling"; that The A. S. Abell Company be enjoined from accepting advertising from Mascaro under the trade name of "Snelling and Snelling" for publication in the Baltimore *Sunpapers;* and that The C. & P. Telephone Company be enjoined from listing Mascaro in its telephone directories under the trade name of "Snelling and Snelling".

On January 7, 1966, Judge Prendergast signed a temporary ex parte injunction to be effective for a period of ten days. Thereafter, Mascaro filed a motion to dissolve the temporary injunction. A hearing was held before Judge Cullen, and on February 2, 1966, the ex parte injunction was dissolved and an interlocutory order signed, ordering Mascaro to identify his franchise with the designation of "Dundalk-Essex. A. R. Mascaro" immediately following the use of the name "Snelling and Snelling", and to state that he was not connected with any other Snelling and Snelling office. The order was effective as to all stationery, literature, and records used by Mascaro. By its terms, it was to be effective until a "final determination on the merits" of this case.

The evidence shows that Drossner encountered some initial difficulties in the operation of Snelling-Baltimore, pri-

marily due to the failure of a prior Snelling and Snelling franchise for Baltimore City and seven counties extending in all directions from the Baltimore metropolitan area. This former franchise had been granted by Snelling-Philadelphia to two individuals in 1956, but it was unsuccessful and closed in January of 1959, apparently leaving some creditors unpaid. These obstacles were soon overcome by Drossner, however, due to his intensified advertising and apparently boundless energy in building his franchise to its present outstanding position in the employment agency field in Maryland.

Drossner testified that, from the time he began operations in August of 1960 to October 1, 1966, he had spent $112,500 in varied and diversified forms of advertising. During that same period, he had made total payments to Snelling-Philadelphia of $82,740. He further testified that immediately following the opening of the Mascaro office in the Dundalk-Essex area, a number of incidents occurred which showed that there was considerable public confusion concerning Mascaro's ostensible connection with the four Drossner offices. Without recounting all of the incidents in detail, this Court is convinced that confusion did occur and that much of it was due to Mascaro's advertising, which made an undisguised attempt to link his office with the four offices operated by Drossner. In fact, Mascaro admitted that, in response to one telephone inquiry, he stated that "we have five offices in this vicinity".

Mascaro testified that, before he signed his contract with Snelling-Philadelphia, he was given ample assurances by the latter that there would be no legal complications involved. He admitted, however, that he had continued to use the name "Snelling and Snelling" on his income tax returns and in filing his application with the State Department of Labor and Industry for his Maryland employment agency license, even after this Court's restraining order of February 2, 1966.

Robert Snelling, Jr. testified that he is president and treasurer of Snelling-Philadelphia, and that he had conducted

the pre-contract negotiations with both Drossner and Mascaro. The thrust of Mr. Snelling's argument, in defense of Mascaro (paid for by Snelling-Philadelphia), is that (1) the license agreement authorizes the licensee only to maintain one Snelling and Snelling office in the area covered by the contract; (2) the licensee cannot advertise beyond his franchise area; and (3) the business of each licensee is aided, not harmed, by the addition of more and more Snelling and Snelling offices in the same general territory. In other words, each office works not only for itself but for the benefit of all other Snelling and Snelling offices, in a manner akin to a "one big happy family" arrangement. Mr. Snelling maintained that there could be no confusion, although he admitted that Drossner had popularized the name "Snelling and Snelling" and had added "value" to the name in the Baltimore area.

However, Mr. Snelling was unable to explain satisfactorily, at least to this Court, his insistance upon a revision (beneficial to Snelling-Philadelphia) of the Snelling-Baltimore contract when Drossner opened his Highlandtown office. These are Mr. Snelling's words:

> "He [Drossner] was putting it close enough to a border, to kill a potential sale of a franchise in the suburbs, possibly, and because of that I exacted a change in the franchise agreement to 7%."

The only meaning which the Court can place upon this testimony is that the multiple granting of franchises in the same general area does create confusion, and in Mr. Snelling's words, could "kill a potential sale of a franchise" when the offices are located within that same general area. This does not support Mr. Snelling's "one big happy family" theory. If one is to believe Mr. Snelling's testimony that every licensee is aided, not harmed, by the nearby competition of another Snelling and Snelling office, what is the purpose in designating a franchise area in the first place? If, by solicitation and advertising, every Snelling and Snelling licensee can invade, for practical purposes, the franchise territory of

his Snelling and Snelling neighbor, then there would seem to be no purpose whatever in designating geographical boundaries for each licensee.

Moreover, the language of the contracts themselves uniformly emphasizes the particular value of using the name "Snelling and Snelling" without competition. All of the contracts include a provision that the name "Snelling and Snelling", its reputation, its methods, its techniques, and the opportunities acquired by the licensee "as a member of the Snelling and Snelling system" are of "considerable value". Therefore, after termination of the contract, the licensee is prohibited from engaging in a similar business within thirty-five miles of his former franchise area for a period of three years, or "within thirty-five miles of any other Snelling office or franchise area now or hereafter established by Snelling for a period of eighteen (18) months". Again, such a contract provision is hardly consistent with Mr. Snelling's testimony that nearby competing Snelling and Snelling offices provide welcome business assistance for each other.

The evidence is clear and convincing to this Court that Snelling-Philadelphia, by its actions as described in this case, has deliberately encouraged the very type of destructive competion and confusion which its own contracts seek to eliminate after they have been terminated. It is the type of competition which, the evidence shows, results in such confusion that only one party can benefit therefrom—Snelling-Philadelphia. Regardless of the damage to a licensee who has built a substantial business over a period of years, Snelling-Philadelphia gains by a "shotgun" approach which saturates an area with multiple offices, resulting in redoubled efforts by the licensees and a competition so intense that only Snelling-Philadelphia is benefited.

Under these facts, therefore, the Court holds that Mascaro with the encouragement and assistance of Snelling-Philadelphia, has engaged in unfair competition with Snelling-Baltimore, in such a manner that equitable relief is justified. Basi-

cally, the test is whether or not the competition includes the element of deception, in such form that it misleads and deceives the public. This principle is succinctly stated by the Court of Appeals in the case of *Edmondson Village Theatre v. Einbinder*, 208 Md. 38, at page 44 as follows:

> "The essential element of unfair competition is deception, by means of which the goods of one dealer are passed off as the goods of another, and the seller receives the profit which he would not have received except for such deception. Therefore, in order to warrant a court of equity in granting an injunction to restrain unfair competition, the acts complained of must be of such a nature as to mislead and deceive the public, so that the defendant is in effect taking advantage of the good will and business reputation which the complainant has built up through service or advertising or in any manner regarded as lawful and proper."

The earlier case of *Baltimore Bedding Corporation v. Moses*, 182 Md. 229, states the underlying principle of unfair competition in the following language at pages 236-237:

> "This law, both in letter and spirit, is laid upon the premise that, while it encourages fair trade in every way and aims to foster, and not to hamper, competition, no one, especially a trader, is justified in damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods of any sort. This necessarily precludes the trading by one dealer upon the good name and reputation built by another. *Two Centuries Growth of American Law*, p. 436, W. K. Townsend; *Nims on Unfair Competition and Trade Marks*, 3rd Ed., 6-15.
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> "What constitutes unfair competition in a given case is governed by its own particular facts and circumstances. Each case is a law unto itself, subject, only, to the general principle that all dealings must be done on the basis of common honesty and fairness, without taint of fraud or deception. Wherever, in

> any case, these elements of fair trade are found to be lacking equity will grant protection against the offending party. *Foss v. Culbertson*, 17 Wash. 2d. 610, 623, 136 P.2d 711, 717."

Counsel for Mascaro has cited several cases in argument which, upon their facts, do not seem to be applicable to this case. In *A. & H. Transportation, Inc. v. Save Way Stations, Inc.*, 214 Md. 325, the Court of Appeals affirmed a lower court decision which found that no unfair competition existed in the use of the trade name "Save Way" gasoline in competition with "Savon" gas. Under the facts of that case, however, the lower court "expressly found that there was no present or prospective confusion" due to the use of the name "Save Way". The Court of Appeals held that "unless some possibility of confusion on the part of the average purchaser were shown, there would be no occasion for granting an injunction". In the instant case, this Court must find from the facts that the only possible and practical result of Mascaro's actions was to create confusion on the part of potential customers of Snelling-Baltimore.

In the case of *National Shoe Stores Company v. National Shoes of New York, Inc.*, 213 Md. 328, the Court of Appeals held that the words "National Shoes" did not constitute a distinctive or unique phrase, and thus they were "not subject to exclusive appropriation as a technical trademark"; that there was no evidence of fraud or deceit; and that the phrase "National Shoes" had not acquired a secondary meaning. Again, it must be emphasized that the instant case does include convincing evidence of deception on the part of the defendant, whether or not it was deliberately intended to accomplish this purpose.

The *Edmondson Village Theatre v. Einbinder* case, *supra*, although fully stating the elements of unfair competition, held that the facts of that case did not justify equitable relief. Commenting on the evidence, the opinion holds that "there was no evidence to show that defendant had been misleading any patrons and inveigling them into driving in-

to the outdoor theatre when they were looking for the indoor theatre". The exact opposite is present in the instant case; and in fact, the legal principles stated in *Edmondson Village Theatre* support the plaintiff's claim for equitable relief here.

Counsel for Mascaro has also cited two out-of-state cases which, in the Court's opinion, are likewise not controlling of the facts in this case. In the case of *Vermont Maple Syrup Company v. F. N. Johnson Maple Syrup Company*, 272 Fed. 478 (D. Vt. 1921), the Vermont District Court of Appeals held, in principle, that a licensee who first uses the trademark or tradename of another in a new territory does not become the absolute owner thereof in that territory. In that case, however, there was no grant of an exclusive right to use a trademark or tradename. The licensor had organized the licensee, but after relinquishing its control of the licensee, was permitted by the Court to make sales under its own trademark and tradename in the territory of its former licensee. This decision was based upon the fact that the licensor did not relinquish its ownership of the trademark and tradename at the time it relinquished its control of the licensee. No such situation exists in the instant case.

In the case of *Pike v. Ruby Foo's Den, Inc.*, 232 F2d. 683 (D.C. Cir. 1956), aff'd sub nom, *Golden City Restaurant, Inc. v. Pike*, 246 F.2d 684 (D.C. Cir. 1957), the Court was faced with the question as to whether a tradename was a proper asset of a business to be sold at a judicial sale. The lower Court held that, as the development of a tradename in one geographical area did not bar its use by another in a different area, the tradename passed with the sale. The Circuit Court of Appeals remanded the case for a determination of the validity of the licensing agreement, holding that the general principle relied upon by the lower court was not controlling, but necessarily had to be based upon the terms of the licensing agreement.

For the above reasons, the Court holds that Snelling-Baltimore is entitled to the relief prayed in the bill of complaint.

This holding is based upon the contract rights which were acquired by Snelling-Baltimore in its contract of July 5, 1960 with Snelling-Philadelphia. The Court cannot agree with the contention of Snelling-Baltimore that it has acquired a common law right to the exclusive use of the name "Snelling and Snelling" in the Baltimore metropolitan area. It has acquired a legal right, by contract, to the *exclusive* use of the name "Snelling and Snelling" in Baltimore City. However, it is clear as a practical matter that the operations of Mascaro, by solicitation and advertising, cannot be effectively confined within his Dundalk-Essex franchise area without invading at least some sections of Baltimore City. Newspapers, telephone lines, and television and radio broadcasts are not inhibited by the arbitrary geographical limits of a franchise area. It is here that Mascaro, with the assistance of Snelling-Philadelphia, infringes upon Snelling-Baltimore's "exclusive right to use the name Snelling and Snelling" in connection with its office located in Baltimore City.

Therefore, the Court will sign a permanent injunction, incorporating the provisions of the interlocutory order signed by Judge Cullen on February 2, 1966, and adding thereto a prohibition against Mascaro's use of the name "Snelling and Snelling" without the identifying suffix in his applications for any licenses from any governmental agency to operate an employment agency, and in any income tax returns filed by him. The Court will not enjoin the defendants, The A. S. Abell Company and the C. & P. Telephone Company of Maryland, from accepting advertising or telephone listings which may be in violation of the injunction against Mascaro. This would place unreasonable restrictions upon these two defendants, who are not parties to the contractual relations between Snelling-Philadelphia and Snelling-Baltimore, or between Snelling-Philadelphia and Mascaro.

/s/ Charles D. Harris
Judge

December 5, 1966.

APPENDIX E

[Caption Omitted in Printing]

DECREE OF THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY[5]

DECREE

(Filed January 4, 1967)

This cause standing ready for hearing on its merits, testimony was taken, counsel for the parties were heard and the proceedings read and considered.

It is thereupon, this 4th day of January, 1967, by the Circuit Court of Baltimore City, ADJUDGED, ORDERED AND DECREED, that the Interlocutory Order herein of February 2, 1966, which by its terms was to be effective pending a hearing and final determination on the merits herein, be and the same is hereby dissolved as to all defendants herein.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that Angelo R. Mascaro, one of the defendants, be and he is hereby perpetually restrained and enjoined from using the name "Snelling and Snelling" (or "Snelling & Snelling") (a) in advertising his employment agency business in any news media, (b) in listing his said employment agency business in any alphabetical, classified, or information telephone directory, (c) on any of his stationery (including, but not limited to, envelopes and letterheads), handouts, application agreements, receipts and invoices, business cards and other material distributed to the public, (d) on his applications for any licenses from any governmental agency to operate an employment agency business, and (e) in any income tax returns filed by him, unless he includes the identifying designation of "Dundalk-Essex, A. R. Mas-

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[5] This Decree appears at pages 31-32 of Volume I of the printed "Joint Record Extract" which is indexed at page 2 of the certified transcript of record (R. 2) herein.

caro", or "(Dundalk-Essex)" "A. R. Mascaro", immediately following said name (and, in the advertising and listing referred to in (a) and (b) above, in the same size type, print or lettering as said name if the use of said name is in typed, printed, written or other graphic form) and the explanatory words "not connected with any other Snelling and Snelling office in this or "the Baltimore area" or "(not connected with any other Snelling and Snelling office)", in a prominent place therein, except that said Angelo R. Mascaro, one of the defendants, be and he is hereby relieved of the necessity of including said identifying designation and explanatory words in connection with the use of said name "Snelling and Snelling" (or "Snelling & Snelling") on the door to the office of his said employment agency business.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that said Angelo R. Mascaro, one of the defendants, pay the costs of this proceeding.

Charles D. Harris
Judge.